

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 16, 2008 Session

MELINDA K. COLSTON v. ANTHONY B. COLSTON

Appeal from the Circuit Court for Sumner County
No. 28454-C C. L. Rogers, Judge

No. M2007-02757-COA-R3-CV - Filed August 21, 2009

Husband appeals the award of alimony *in futuro* to Wife and the division of marital assets, contending that he is unable to pay the alimony awarded and that the trial court's division of the marital assets was inequitable. We modify and affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Modified and Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT and WALTER C. KURTZ, JJ. joined.

Gary M. Willams, Hendersonville, Tennessee, for the appellant, Anthony Bruce Colston.

Mark T. Smith, Gallatin, Tennessee, for the appellee, Melinda Kay Colston.

OPINION

Melinda Kay Colston ("Wife") filed for divorce in the Circuit Court for Sumner County from Anthony Bruce Colston ("Husband") on May 3, 2006; at the time of the divorce, they had no minor children. Husband filed an answer and counterclaim. Following a trial, the court granted Wife's petition on the grounds of inappropriate marital conduct and adultery. The final decree of divorce divided the marital assets and debts and awarded Wife alimony *in futuro* of \$3,000.00 per month. Husband appeals the award of alimony and the division of assets, asserting that he does not have the ability to pay the alimony and that the division of assets was inequitable.

Analysis

The Award of Alimony

We review an award of alimony under the abuse of discretion standard. *Herrera v. Herrera*, 944 S.W.2d 379, 388 (Tenn. Ct. App. 1966). Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. See *Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). If a discretionary decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

When determining whether to award alimony the trial court is to consider the factors set forth at Tenn. Code Ann. § 36-5-121(i). While a trial court is directed to consider all the factors in light of the circumstances, the two most important factors are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007) (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002)). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Id.* (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)).

The trial court based its finding that alimony was appropriate on Wife's "age, physical condition, length of marriage . . . contribution to the marriage, her income, and Husband's continued generation of six and seven figure sales. . . ." At the time of trial, Wife was 46 years old and had been married to Husband for 28 years; she had not worked in ten years, due primarily to a medical disability. She suffered from type 1 diabetes with peripheral vascular disease and took medications for diabetes, high blood pressure, high cholesterol, to protect her kidneys, a diuretic, and an anti-depressant, among other things. She has been receiving social security disability since 1995. The court's finding that Wife was in need of alimony is supported by clear and convincing proof.

The trial court's finding of Husband's ability to pay alimony is based in part on the court's disbelief of his testimony that he was unable to work due to his medical condition as well as the court's finding that Husband worked and received income from his business despite being disabled. The record shows that on December 15, 2004, Husband was found by an administrative law judge of the social security administration to be disabled "because of insulin dependent diabetes mellitus with peripheral neuropathy, chronic pain syndrome, torsion dystonia, pontine stroke and depression" and that he was "unable to perform any work existing in significant numbers in the national economy." However, the record also shows that, through 2006, Husband was engaged in the operation of his cable sales business and that, in the first few months of 2007, the fiber optic sales

business operated by Husband's girlfriend, with whom Husband lived, generated over \$400,000.00 in revenue.¹

The court found Husband to be a less than credible witness and discounted his testimony. Because the trial court observes the witnesses as they testify, it is in the best position to assess witness credibility. *Frazier v. Frazier*, No. W2007-00039-COA-R3-CV, 2007 WL 2416098, *2 (Tenn. Ct. App. Aug. 27, 2007) (citing *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779,783 (Tenn. 1999)). Therefore, we give great deference to the court's determinations on matters of witness credibility. *Id.* "Accordingly, we will not reevaluate a trial judge's credibility determinations unless they are contradicted by clear and convincing evidence." *Id.* In addition to the credibility determination, the court made extensive findings of fact relative to Husband's deceptive business and financial practices and his "dishonest[y] with the Court about his assets and business." Husband has not pointed to evidence that contradicts the trial court's findings and there is ample proof in the record that Husband has the ability to pay alimony. The record supports the court's application of the factors at Tenn. Code Ann. § 36-5-121(i) to determine that an award of alimony to Wife was appropriate.

Once the trial court has determined that alimony is appropriate, it must determine the nature, amount, and duration of the award. The court may award "rehabilitative alimony, alimony *in futuro*, also known as periodic alimony, transitional alimony, or alimony *in solido*, also known as lump sum alimony or a combination of these" Tenn. Code Ann. § 35-5-121(d)(1). An award of alimony *in futuro* is appropriate "where there is relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors," including those enumerated in § 36-5-121(i). Tenn. Code Ann. § 36-5-121(d)(3). According to Tenn. Code Ann. § 36-5-121(f)(1):

Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that *the disadvantaged spouse is unable to achieve . . . an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable . . . to the post-divorce standard of living expected to be available to the other spouse . . .*

Tenn. Code Ann. § 36-5-121(f)(1) (emphasis added).

Wife testified that Husband maintained the family finances throughout the marriage and that he allowed the finances to deteriorate over the last years of the marriage so that "he would show

¹ The court found as follows:

Husband has the ability to pay despite his efforts to conceal business income. His actions demonstrate the ability to pay his girlfriend \$33,000.00 over 12 months and to pay to or for the Wife \$53,500.00 over the same period. The Husband continues the same business with one to two million in sales in 2006 and \$400,000.00 over the first 5 months of 2007.

nothing” if she filed for divorce again.² The proof at trial was that Husband had left the marital home, was not contributing to the upkeep of the home, and had filed a bankruptcy petition in part in an unsuccessful effort to keep the marital home, in which Wife resided, from being foreclosed upon. Wife testified that the utilities on the home had been in arrears and that she had to charge the utilities to her credit cards in order to keep them on, but her monthly financial needs approximated \$4,000.00. She had no prospects for future income other than her monthly disability benefits in order to maintain a basic lifestyle. The nature and amount of the alimony awarded by the trial court was supported by the evidence.³

The Division of Marital Property

Husband contends that the trial court’s division of marital property was inequitable. Specifically, he contends that he should have been awarded the truck he was driving, one-half of the household furnishings, all of his social security lump sum payment, one-half of the value of the coin and baseball card collection and one-half of the interest in two cemetery plots.

Trial courts have “wide latitude in fashioning an equitable division of marital property,” and their decisions will be given great weight by the court of appeals. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App.1996). We will not overturn a trial court’s division of marital property in the absence of evidence that the distribution “lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures.” *Herrera*, 944 S.W.2d at 389 (citing *Wade v. Wade*, 897 S.W.2d 702, 715 (Tenn. Ct. App.1994)).

In dividing marital property, the court is to apply Tenn. Code Ann. § 36-4-121. Under this statute, all real and personal property acquired by either party during the course of the marriage and owned by either or both spouses is classified as marital property, which the court is obliged to equitably divide. Factors which are to be considered by the court in making such division are as follows:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;

² Wife had filed for divorce in 2003, but withdrew the proceeding.

³ A benefit of alimony *in futuro* is that it can be modified in the event of a substantial and material change in circumstances. “An award of alimony *in futuro* shall remain in the court’s control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances.” Tenn. Code Ann. § 36-5-121(f)(2)(A).

- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time of the division of property to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c).

In its division of property, the court provided, *inter alia*, the following:

That the Plaintiff/Wife, Melinda Colston, and the Defendant/Husband, Anthony Colston, shall each retain their own personal property, the current vehicle they are using, and all other personalty in their possession, except:

(1) The Plaintiff/Wife is awarded all right, title and interest in the 1997 Mercury Grand Marquis LS automobile, Any interest of the Defendant/Husband in said vehicle is divested out of him and vested solely in Plaintiff/Wife.

(2) Two cemetery plots in Woodlawn Cemetery in Nashville, Davidson County, Tennessee.

(3) The Plaintiff/Wife shall receive as her sole property her jewelry, all pets, and from the lump sum funds current balance, the Plaintiff/Wife is to be paid \$5,000 for her interest in the coin and card collection, and one-half of the then remaining balance of said lump sum funds.

(4) The Defendant/Husband shall pay all joint credit card debt and other debt in his sole name, all business loans, and debt and he will hold the Plaintiff/Wife harmless for any liability. The Plaintiff/Wife shall pay the QVC account and the Chase VISA account in her sole name and hold the Defendant/Husband harmless for any liability.

Following entry of the order, Husband filed a motion asking the court to “state with specificity what personal property each party is entitled to,” attaching a list of items he requested; the motion was later amended to assert that the court “did not divide the substantial personal property of the parties pursuant to the appraisal report of the personal property assets of the parties,

submitted as an exhibit at trial, or upon any proof at trial as to how the personal property should be divided.”⁴ Following a hearing the court entered an order denying Husband’s motion and providing in pertinent part as follows:

During the trial, a list and appraisal of a portion of the personal property in Plaintiff’s possession was introduced as Exhibit 2. No other testimony, list, exhibit or counsel statement was made by the Defendant or in the Defendant’s behalf asserting any claim to specific items of personal property not in his possession. Defendant testified the Plaintiff Wife could have it all.

With respect to the household furnishings, Husband does not contest the trial court’s holding that he made no claim to specific items at trial; rather he asserts that the value of the furnishings should be considered in determining whether the division of assets was equitable. He also requests that this court remand the matter for a hearing “in order to separate the assets set out in Mr. Massa’s appraisal.”

The statute requires that marital property be equitably divided. There is no indication that the court was not inclined to so divide the household furnishings but for Husband’s disclaimer, both by his testimony and his actions, of a desire to receive any of the household furnishings.⁵ Husband cannot now complain about the court’s disposition of property in which he disclaimed an interest or claim that the value of the property should be considered in determining whether the division was equitable. Upon his disclaimer, the property became the separate property of Wife and was not subject to division as marital property. We also note that the trial court found that, when Husband left the home, some marital property “disappeared” and there is nothing in the record to show what, if any, marital property was in Husband’s possession at the time of the trial.

With respect to Husband’s truck, it appears from the record that the trial court awarded to Husband and Wife “the current vehicle they are using,” but went further with respect to Wife’s vehicle by expressly divesting Husband of his interest in the vehicle and vesting his interest in Wife; the court failed to use reciprocal divestiture language with respect to Husband’s truck.⁶ To the extent that the court’s order is ambiguous or unclear in this regard, we modify same by divesting Wife of all right, title and interest in the 1997 Ford F-250 in possession of Husband and vest Wife’s interest in Husband.

⁴ An appraisal prepared for Husband setting the fair market value of personal property of the parties at \$28,725.00 was made an exhibit at trial.

⁵ We have reviewed Husband’s trial testimony and do not find that the trial court was in error in stating Husband testified that Wife “could have it all.” Further, it does not appear that the statement was made under duress or was made under circumstances under which it should not be taken at face value; in any event, to the extent Husband wished to recant the testimony, he failed to do so.

⁶ In his brief on appeal, however, Husband has included the truck as property awarded to him.

Husband has failed to explain in what manner the trial court erred in its order pertaining to his lump sum social security benefit. He does not contend this was not marital property and subject to division by the trial court but merely asserts that he should have been awarded all of the benefits, net of counsel fees. The trial court ordered that the lump sum be divided equally, after deduction of counsel fees; one alimony *in solido* payment in the amount of \$3,000.00 and \$5,000.00 granted to Wife to be applied to her counsel fee was ordered to be deducted from Husband's half of the lump sum. We do not find error in this regard.

Husband seeks to be awarded the monetary value of his marital interest in the cemetery plots. Unlike the household furnishings, the trial court gave no explanation of its award of both cemetery plots to Wife and our review of the record reveals no basis for the trial court not to equitably divide the cemetery plots, which, according to Husband's testimony, the parties had owned for seven years. We, therefore, modify the trial court order by awarding Husband \$5,000.00, representing the value of his interest in the cemetery plots, to be paid by Wife if she wishes to retain both plots or to be paid to Husband from the proceeds of the sale of the plots.

Finally, Husband contends that he should be awarded "½ of the coin and card collection." The trial court found that the list of assets submitted by Husband failed to include the coin collection and baseball card collection, which the court held was valued by Husband at \$10,000.00, and awarded Wife \$5,000.00 for her marital interest. Husband has failed to articulate the manner in which the trial court is alleged to have committed error in this regard as is his responsibility, *see* Rule 27(a)(7), Tenn. R. App. P., and our review of the record does not reveal any error of the trial court in this regard.

Wife's Request for Attorney's Fees

Wife requests that she be awarded counsel fees incurred in defending this appeal. She correctly notes that the decision as to whether to make such an award is a discretionary one. In light of the issues presented in this case and our disposition of same, we decline to make such an award.

Conclusion

For the reasons set forth above, we affirm the judgment of the Circuit Court, as modified. Costs are assessed equally between the parties, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE